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No. 03-724

In the Supreme Court of the United States

F. HOFFMAN-LAROCHE, LTD., ET AL.,

Petitioners,

v.

EMPAGRAN, S.A., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Under Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioners has consented to the filing of this brief, but counsel for respondents has refused consent.

The Chamber is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. The Chamber is well situated to brief the Court on the importance of the issues presented in the petition to companies collectively responsible for a substantial portion of total U.S. economic activity.

This case is an excellent vehicle for the Court to clear up the growing confusion among the lower courts regarding the right of foreign actors suffering injuries abroad to sue in U.S. courts and take advantage of U.S. antitrust laws. In the decision below, the D.C. Circuit interpreted the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, in a manner that rejects the views of the Executive Branch, conflicts directly with a prior decision by the Fifth Circuit, and fails to follow the rationale of recent decisions of the Third and Seventh Circuits. Together with the decision last year in *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), cert. dismissed, 124 S. Ct. 27 (2003), the decision vastly expands the ability of plaintiffs to seek compensation in U.S. courts for injuries arising from the foreign effects of allegedly anticompetitive behavior.

The D.C. Circuit's expansion of the antitrust jurisdiction of U.S. courts threatens the Chamber's members with a dramatic increase of global forum shopping in the antitrust arena. Unusually permissive features of the American judicial system – including class actions, permissive discovery rules, and provisions for multiple and punitive damages – have proved immensely attractive to foreign plaintiffs with a basis to invoke U.S. court jurisdiction. Thus, even though foreign governments have developed their own mechanisms for redress of antitrust violations, the D.C. Circuit's construction of the FTAIA will invite foreign plaintiffs to sue here. Under this state of affairs, U.S. courts will become the global arbiters of civil liability for antitrust issues ranging from international price-fixing conspiracies to run-of-the-mill localized mergers – even when the claims at issue have little or no connection to the United States.

The likely flood of antitrust actions undoubtedly will inflate litigation costs and potential civil liability borne by the Chamber's members. But the D.C. Circuit's permissive new rule is entirely one-sided: members of *amicus* Chamber who are the *victims* of antitrust violations will gain no increased protections. If anything, affording permissive access to U.S. courts for foreign antitrust plaintiffs will dilute civil recoveries available to U.S. plaintiffs, even while inflating civil liability to U.S. defendants.

Members of *amicus* Chamber, a large and increasing number of which transact business in foreign countries, have a substantial interest in seeing the restoration of the limits placed on U.S. antitrust jurisdiction by the FTAIA. At a minimum, members of the Chamber need a coherent rule among the appellate courts in this country to order their legal expectations rationally.

The Chamber therefore should be granted leave to file the attached *amicus* brief.

Respectfully submitted.

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

This case is about global forum shopping. It is an attempt by foreign plaintiffs to take advantage of the liberality of the U.S. antitrust laws; the openness of U.S. courts; pro-plaintiff aspects of the Federal Rules of Civil Procedure; and the generosity of U.S. juries. The precise issue petitioners ask the Court to review is whether a provision of the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a – a statute passed in 1982 based on a recommendation by the Reagan Administration to amend existing law to *limit* aspects of U.S. antitrust jurisdiction that had caused international friction – gives these plaintiffs the keys to U.S. courts to seek redress for injuries they claim to have suffered in the Ukraine, Australia, Ecuador, and Panama.

The provision that has caused the circuits such consternation, producing a three- or four-way circuit split (Pet. 8-12), is this (15 U.S.C. § 6a):

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless —
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect —

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[1] Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

For 20 years after the statute's enactment, businesses like members of *amicus* have ordered their legal affairs with a settled understanding. Businesses have understood that the FTAIA's plain language precludes claims for purely foreign injury and that the FTAIA should be read in harmony with this Court's rules for antitrust injury. Those rules, as expressed in *Brunswick Corp.* v. *Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477 (1977), and its progeny, dictate that courts dismiss claims based on injuries that do not "flow[] from that which makes defendants' acts unlawful" (*id.* at 489) – *i.e.*, the *domestic* effects identified in the text of the FTAIA. During that period – which witnessed the transition of former command economies to market economies – international and multinational commerce flourished. See William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 ST. JOHN'S L. REV. 361, 361-363 (2000). Part of that economic story has been the creation of antitrust enforcement systems worldwide – such that in the years since 1950, when ours was the only "robust system of antitrust laws," scores of countries have developed antitrust regimes. *Id* at 362. Multinational businesses have learned to order their affairs based on the myriad regulatory schemes they face worldwide.

In the last 20 years, globalization of U.S. commerce has produced extraordinary benefits to the U.S. economy. During the prosperous 1990s, exports accounted for one-quarter of overall economic growth, and trade liberalization is credited with causing sustained economic growth during that decade. Secretary of Commerce Donald L. Evans, Remarks at the Meeting of the National Corngrowers Association (July 16, 2001), available at http://www.commerce.gov/opa/speeches/Evans/2001/July_16_Evans_Corn_Assoc.html.

The understanding that U.S. business and the U.S. antitrust enforcement agencies had of the reach of U.S. antitrust laws was well stated by the Fifth Circuit's decision in *Den Norske Stats Oljeselskap As* v. *HeereMac v.o.f.*, 241 F.3d 420, 428 (5th Cir. 2001): "[T]he FTAIA precludes subject matter jurisdiction * * * where the situs of the injury is overseas and that injury arises from effects in a non-domestic market." In *HeereMac*, the Fifth Circuit affirmed dismissal for lack of jurisdiction of a claim brought by a foreign plaintiff claiming competitive injury in the North Sea – interpreting the FTAIA to require that the plaintiff bringing the lawsuit suffer domestic effects from the alleged anticompetitive conduct. *Id.* at 427-428.

Within the past year the balance in global antitrust enforcement has been upset twice by decisions from U.S. courts of appeals that impose U.S. antitrust laws and standards on international conduct. This result was never envisioned by Congress, and has not played into the risk calculations of businesses making the decision to engage in global commerce. See Deputy Assistant Attorney General Makan Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications* 7-8 (Nov. 18, 2003), available at http://www.usdoj.gov/atr/public/speeches/201509.pdf (*Delrahim Remarks*). First, the Second Circuit in *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), cert. dismissed, 124 S. Ct. 27 (2003), and now the D.C. Circuit in the decision below, have interpreted the FTAIA to *permit* suit under U.S. antitrust laws by foreign plaintiffs claim-

ing injury suffered only abroad. Pet. App. 20a; *Kruman*, 284 F.3d at 390. According to the D.C. Circuit, both jurisdiction and standing can be supported by reference to an injury suffered by someone other than the plaintiff: "the plaintiff must" only "allege that *some* private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant's" antitrust violation. Pet. App. 23a (emphasis added).

Dissenters from the interpretation of the FTAIA followed by the decision below include Judge Henderson of that court (Pet. App. 40a); Judges Sentelle and Randolph, who voted for *en banc* review (Pet. App. 44a); Judge Hogan, whose opinion the D.C. Circuit reversed (Pet. App. 45a); and Judge Kaplan of the Southern District of New York (*Kruman* v. *Christie's Int'l PLC*, 129 F. Supp. 2d 620, 624 (S.D.N.Y. 2001), rev'd, 284 F.3d 384 (2d Cir. 2002)). The U.S. government consistently has taken the position that *HeereMac*, not *Kruman* or the decision below, reflects the proper interpretation of the FTAIA. See Pet. 7; Pet. App. 67a; *Delrahim Remarks* 7 ("[W]e believe that *Kruman* and *Empagran* have profoundly disturbing policy implications."). Indeed, except for the misguided holdings of the court below and the Second Circuit, there is near unanimity of belief that – as a matter of statutory interpretation, antitrust policy, and international comity – U.S. law does not afford relief to foreign plaintiffs claiming foreign injury.

SUMMARY OF THE ARGUMENT

The flood of litigation that stands to be unleashed by the decision below – which opens the courts of the United States to foreign plaintiffs who suffered no injury in the United States – is by itself enough reason for this Court to grant certiorari. The distinctive features of the U.S. civil litigation system and the relative severity of U.S. laws will exert an inexorable pull on foreign plaintiffs seeking the most favorable forum for their claims. The inevitable flow of litigation to the United States is not justified by an increase in deterrence, as the D.C. Circuit uncritically assumed. Indeed, ratcheting up the exposure of

defendants in civil actions in U.S. courts *undermines* detection of cartel behavior, as the U.S. antitrust authorities and the Solicitor General advised the D.C. Circuit in vain.

Giving the class-action bar access to worldwide potential plaintiffs, for injury *not* suffered in the United States, is a recipe for disaster. "Blackmail settlements" (Judge Friendly's term) can only increase. The only reason there has not been *even more* of a rash of litigation than has already been spawned by the decision below and the Second Circuit's *Kruman* decision is that lawyers like respondents' counsel have been publicly telling potential plaintiffs to await this Court's action before suing.

There is no reason to await another case before resolving the issue cleanly presented by the petition. The hydraulic pressure to settle these massive cases makes it important for this Court to seize the opportunity to address one that has not settled.

International friction will inevitably result if the decision below stands. Expansive interpretations of U.S. antitrust jurisdiction have caused friction for decades, even with our closest trading allies. Other nations can and do protect their own citizens through antitrust or antitrust-like regimes, and there is no need or justification for the United States to substitute its forums and procedures for those nations' forums and procedures.

The holding below that foreign plaintiffs may sue for foreign injuries as long as "*some* private person or entity has suffered actual or threatened injury" in the United States, Pet. App. 23a (emphasis added), would open the U.S. courts to antitrust cases challenging conduct far different from the price fixing at issue in this case. Canadian consumers and competitors, for example, plainly would be able to challenge in U.S. courts the effects on intra-Canadian routes of the merger between Air Canada and Canadian Airlines. This Court, not a divided D.C. Circuit, should decide whether U.S. antitrust jurisdiction is to be so expansive, and whether the views of the Executive Branch in this sensitive matter of foreign relations are to be rejected.

On the merits, the Chamber urges reversal for all the reasons given by petitioners and the Solicitor General. In particular, even respondents concede that the FTAIA incorporates the "antitrust injury" principle of *Brunswick*, and that principle requires dismissal of claims that stem not from "that which makes defendants' acts unlawful" (429 U.S. at 489) – the acts' *domestic* effects – but from foreign effects that the FTAIA plainly states are *not* enough to constitute a violation of U.S. law.

ARGUMENT

I. The Decision Below Would Produce Overwhelming Burdens on U.S. Businesses, Would Flood U.S. Courts With Claims by Foreign Plaintiffs, and Has No Countervailing Benefits

U.S. courts long have been a favored forum for plaintiffs seeking the liberality of this Nation's damages laws and the generosity of American juries. See, *e.g.*, *Piper Aircraft Corp.* v. *Reyno*, 454 U.S. 235, 247 (1981) (rejecting plaintiffs' argument that more favorable U.S. products liability and wrongful death laws permitted suit in the U.S. for an airplane crash with no other connection to the United States). Although the business risk that litigation poses is by no means a story unique to this case or to the U.S. antitrust scheme, the FTAIA is one of the most important battlegrounds for plaintiffs' continuing efforts to realize the benefits of the U.S. forum instead of other, more appropriate forums.

A. The decision of the court below, combined with the *Kruman* decision from the Second Circuit, threatens a tidal wave of litigation by foreign plaintiffs who, before *Kruman*, could not sue for their injuries incurred wholly abroad (whether or not, in the D.C. Circuit's words, "*some* private person or entity has suffered actual or threatened injury" in the United States, Pet. App. 23a (emphasis added)).

The U.S. antitrust regime has many features that make suit in the United States attractive to foreign plaintiffs. The prospect of treble damages available under Clayton Act § 4, 15 U.S.C.

§ 15, is itself a substantial incentive. See Spencer W. Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, 14 LOY. CONSUMER L. REV. 523, 532 (2002). Other features include "extensive discovery, jury trials, class actions, contingent fees, and even potentially punitive damages." *Ibid.*; see also Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 516 (1998) ("[A]spects of American antitrust practice that are not often found outside the United States [include] jury trials, wide-ranging pretrial discovery without judicial supervision, enforcement by private plaintiffs, extraterritorial discovery, treble damages, class actions, contingent fees, [and] lack of contribution among co-conspirators.").

Taken together, those features provide compelling reasons to bring suit in the United States. "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith Kline & French Labs Ltd.* v. *Bloch*, [1983] 1 W.L.R. 730 (C.A. 1982) (Lord Denning). *Kruman* and the decision below

> combine open U.S. jurisdictional rules, traditional treble damages, and broad U.S. notions of pre-trial discovery into a multi-color brochure for international antitrust tourism that will surely be – indeed, already is – irresistible to many foreign plaintiffs whose alleged injuries have little to do with cognizable U.S. interests. We do not think that is what U.S. antitrust law should be about.

Delrahim Remarks 17. Respondents' counsel clearly is aware of foreign plaintiffs' interest. See Lily Henning, *Antitrust Goes Global: D.C. Circuit Opens the Door to Foreign Victims of Vitamin Price Fixing*, LEGAL TIMES, Oct. 13, 2003 (*Antitrust Goes Global*) (quoting respondents' counsel Paul Gallagher as saying that class actions, jury trials, contingent fees, and discovery are reasons why foreign plaintiffs seek U.S. courts).

In this Court, respondents' counsel characterize the conflict and confusion among the circuits as falling "at the margins of federal antitrust law" (Br. in Opp. 16). On the website of lead counsel, however, they were far more candid in highlighting the far-reaching effect of the decision below:

> [T]he full D.C. Circuit Court of Appeals, widely regarded as the most important appellate court below the Supreme Court, * * * ruled in [this case] that foreign plaintiffs may bring claims in U.S. Courts under U.S. antitrust laws * * * *even though the foreign plaintiffs' injuries did not arise from transactions in the United States.* * * * Paul Gallagher, a partner with Cohen, Milstein Hausfeld & Toll, P.L.L.C., counsel for the foreign plaintiffs and who argued the appeal said, "This is a major ruling in favor of the ability of foreign persons to vindicate their rights in U.S. courts against companies involved in international cartels. This ruling means that litigation against the vitamin manufacturers by foreign plaintiffs will continue in the trial court, with the vitamins defendants being exposed to potential damages in the billions of dollars. The implications to the vitamin defendants are enormous."

http://www.cmht.com/casewatch/cases/cwvitaminpr.html (visited Nov. 22, 2003). Likewise, respondents' counsel discussed the generalized ramifications of the D.C. Circuit's result. "'It's a very, very significant case in terms of the implications for both domestic and foreign companies that do business in the United States,' says Paul T. Gallagher, the plaintiff's lawyer. * * * 'It really increases the potential downside, the potential damages that a foreign defendant is exposed to in a U.S. court.'" Michael Freeman, "Here Comes Treble," *Forbes*.com, Aug. 27, 2003, available at http://www.cmht.com/casewatch/cases/itnTreble.html.

The raft of ill effects from the exceptionally liberal rule adopted by the court below was understood by the Fifth Circuit in *HeereMac*, 241 F.3d at 427-428: "[A]ny entities, anywhere, that were injured by any conduct that also had sufficient effect

on United States commerce could flock to the United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States."

B. Contrary to the conclusion of the court below (Pet. App. 30a-33a), the harms discussed above are not outweighed by possible benefits of increased deterrence. The court's deterrence rationale has no logical upper limit. If the goal of the FTAIA truly is to deter certain types of conduct at all costs, the punitive scheme might be extended up to and including imposing a corporate "death penalty." Compare Thomas Greene & Robert L. Hubbard, *State Antitrust Enforcement Distribution Restraints*, in PLI 42d Annual Advanced Antitrust Seminar 1289, 1297 (2003) ("A number of states also have corporate 'death penalties' whereby a corporation's charter can be revoked for antitrust violations."). One struggles in vain to understand why the D.C. Circuit thought payment of thrice the damages stemming from the U.S. effects of the conspiracy, *plus* criminal fines, *plus* enormous civil penalties in other countries (see Pet. 5), *plus* such damages as may be available to private plaintiffs under the laws of other countries, is insufficient deterrence.

Rather, as the Solicitor General argued to the court below, opening the U.S. courts to all those with claims based on purely foreign injury would have the perverse effect of decreasing incentives for firms to break from cartels, because the increased potential civil liability in cases like this one will be impossible to bear. The corporate leniency policy followed by the Antitrust Division (Pet. App. 78a) eliminates the threat of criminal prosecution for a cooperating corporation and its officers who break from, and disclose, a cartel. *Corporate Leniency Policy*, 4 Trade Reg. Rep. (CCH) ¶ 13,113, at 20,649-21, 20,649-22 (Aug. 10, 1993). See *In re Sotheby's Holdings, Inc.*, Fed. Sec. L. Rep. ¶ 91,059, 2000 WL 1234601, at *3 (S.D.N.Y. Aug. 31, 2000) (noting that Christie's International PLC disclosed the price-fixing agreement, later the subject of a certiorari petition

(No. 02-340) raising the same issue as this case, under the Antitrust Division's corporate leniency policy).

The corporate leniency policy has been considered highly effective. "This [FTAIA] issue has arisen precisely because of the successful detection and prosecution of international cartels by the Division and other antitrust agencies in recent years." Assistant Attorney General R. Hewitt Pate, *Anti-Cartel Enforcement, the Core Antitrust Mission* 10 (May 16, 2003), available at http://www.usdoj.gov/atr/public/speeches/201199.pdf. See also Raymond Krauze & John Mulcahy, *Antitrust Violations*, 40 AM. CRIM. L. REV. 241, 270-271 (2003) (crediting the policy with the majority of U.S. cartel enforcement successes in recent years). To the extent that the fear of private treble-damages liability under 15 U.S.C. § 15 is greater than the fear of criminal prosecution, the leniency policy will be ineffective.[2]

C. The plaintiffs' bar in this country – not ill-used foreign plaintiffs – drives purported international class actions. Recognition of the power of the class-action device is not new, and not limited to cases involving worldwide treble-damages classes. This Court and myriad lower federal courts and commentators have discussed the effect that class certification has on litigation. "Certification of a large class may so increase the defendant's potential economic damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). Class certification presents such pressures because defendants cannot "stake their companies on the outcome of a single jury trial." *In re Rhône-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995). Class actions have been described as "judicial weapons of mass destruction. These suits promise such devastating consequences that even the most innocent of defendants must settle or risk total destruction." *Mass Torts and Class-Action Lawsuits: Oversight Hearings Before the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property*, 105th Cong. (Mar. 5, 1998) (testimony of former Attorney General Dick Thornburgh), available at http://www.house.gov/judiciary/41156.htm. Judge Friendly termed this the "blackmail settlement." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

[2] A bill currently under consideration in Congress would increase criminal penalties for cartel behavior. The same bill would *reduce* damages recovery in certain private suits to "address[] a major disincentive that currently confronts companies who are contemplating exposing cartel activity to the Division – the threat of treble damage lawsuits * * *. Of course, without cartel detection, the potential compensation to consumers harmed by antitrust crime is zero." *Delrahim Remarks* 15-17.

The power of the class-action device takes on entirely new meaning in the context of worldwide classes.[3] If the interpretations of the FTAIA adopted in *Kruman* and the decision below stand, it is fair to expect that plaintiffs' class counsel will take global the search for class action plaintiffs. In the specific case of the litigation that spawned the petition, this is occurring. "Already, some lawyers have begun to cast their nets for clients, hopping planes to places as far afield as the Czech Republic to look for purchasers who bought vitamins from cartel members." *Antitrust Goes Global*, *supra*.

Given this reality, it is disingenuous for respondents to argue to this Court that there has not been an outpouring of litigation resulting from the D.C. Circuit's reading of the FTAIA. Br. in Opp. 15. There *has* been substantial litigation raising this issue (see Pet. 12 n.3). That there has not been *even more* stems to a degree from the control respondents' counsel themselves possess over the floodgates. A recent interview with plaintiffs' counsel in these cases demonstrates that fact: "Kenneth Adams, the Dickstein partner who spearheaded the

[3] Respondents' counsel in this case have trumpeted their success in bringing into the U.S. antitrust class-action fold billions of potential worldwide plaintiffs. Referring to the settlement in *Kruman*'s, the firm notes on its website: "This settlement marks the first time that claims on behalf of foreign plaintiffs under U.S. antitrust laws have resolved in a U.S. court, a milestone in U.S. antitrust jurisprudence." http://www.cmht.com/casewatch/antitrust/auctions.html (visited Nov. 22, 2003).

firm's vitamin litigation, says he's been contacted by a host of foreign plaintiffs, but has advised them to wait until the appeals in Empagran have run their course before filing suit." *Antitrust Goes Global*, *supra*.

The wave of treble-damages suits that the decision below allows, if its interpretation of the FTAIA stands, will severely harm the American business community, including large numbers of Chamber members. Allowing foreign plaintiffs whose injuries arise from foreign effects to sue in the United States can increase potential liability by millions, if not billions, of dollars. This reality is exemplified by the graphic electrodes case pending before the Third Circuit (see Pet. 12), and by the settlement in *Kruman* before this Court could consider the issue (Pet. 10). Even those who support the FTAIA reading followed by the court below, and the even more expansive reading in *Kruman*, note the far-ranging impact of the decisions. See, *e.g.*, Ronald W. Davis, *International Cartel & Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, ANTITRUST, Summer 2001, at 53, 57 ("[T]he mind boggles at expanded class action proceedings, where counsel for purchasers in Alabama and Texas sit at the counsel table with attorneys for subclasses of purchasers in Albania and Tajikistan.").

D. Respondents' argument that the Court should wait until "[o]ther federal law questions that will be addressed on remand" are staged for this Court's review (Br. in Opp. 7-8) is utterly disingenuous. If the Court denies certiorari, it is exceedingly unlikely that the FTAIA issue will be presented to the Court as part of this litigation. Indeed, in *Kruman*, the certiorari petition was dismissed when the parties settled, rather than face continued uncertainty. Pet. 10. For the same reason, the Court should not wait for the pending cases respondents cite (Br. in Opp. 14) to present themselves for review. Preliminarily, *MM Global Servs.* v. *Dow Chem. Co.*, 283 F. Supp. 2d 689 (D. Conn. 2003), is controlled by *Kruman*. And experience teaches that, in light of the hydraulic pressures to settle, these cases might never make it as far as an appellate decision – much less a certiorari

petition. The present case offers a golden opportunity for this Court to settle an issue of profound economic and foreign-relations significance, and the Court should seize the opportunity and not await some other case.

The Court should not wait for the Third Circuit's decision in the *UCAR* appeals (Pet. 12 n.3). That case, arising out of an alleged worldwide conspiracy to fix prices and allocate markets for graphite electrodes, involves a particularly lopsided ratio of foreign injury to domestic injury. The district court reduced the defendants' post-trebling liability in the United States on one part of that case from $687 million to $54 million after dismissing the foreign plaintiffs' claims for injury abroad. *Ferromin Int'l Trade Corp.* v. *UCAR Int'l, Inc.*, 153 F. Supp. 2d 700, 706 (E.D. Pa. 2001), appeal pending, No. 01-3329 (3d Cir.); see also 153 F. Supp. 2d at 703 (noting an even more lopsided ratio in different aspect of the case). That lopsided ratio shows the dramatic effects of an erroneous decision to accept the rule the D.C. Circuit accepted, but it does nothing to make the case any more suitable a vehicle than this one for deciding the clean legal issue presented in the petition.

II. The Decision Below Undermines the Enforcement Authority of Other Countries' Antitrust Agencies and Risks Creating Political Conflict

A. This Court has noted that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). Yet the expansive reading of the FTAIA adopted below imposes U.S. antitrust law – and, in particular, the internationally controversial judgments of U.S. lawmakers concerning class-action procedures and enhanced damages for antitrust violations – on the global community. Rejecting that reading of the FTAIA, the district judge whose opinion the Second Circuit reversed aptly stated that such a reading "impute[s]

to Congress an intention to establish an antitrust regime to cover the world." *Kruman*, 129 F. Supp. 2d at 624.[4]

Expansion of U.S. antitrust jurisdiction is certain to upset foreign governments. "Other countries have for decades protested the perceived aggression with which the United States has imposed its competition laws abroad." Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 249 (2001); see 1 WILBUR L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 2.16 (5th ed. 1996) ("[f]oreign nations, including close allies of the United States, have protested the assertion of U.S. extraterritorial jurisdiction").

In the face of this perceived aggression, those governments do not rest idle. "Foreign governments have reacted with vehemence towards the extraterritorial enforcement of U.S. antitrust laws in a number of circumstances. * * * [P]olite diplomatic notes of concern and diplomatic notes of protest have been supplemented by various foreign 'blocking' statutes." Joseph P. Griffin, *supra*, 6 GEO. MASON L. REV. at 505. One such "blocking statute," the United Kingdom Protection of Trading Interests Act of 1980 (PTIA), creates obstacles to foreign discovery by allowing the Secretary of State for Trade to block a request for documents or other discovery made by a foreign authority. PTIA § 2, 21 I.L.M. 834, 835 (1982). And the PTIA allows British citizens to avoid paying foreign judgments by allowing the Secretary of State for Trade to prevent enforcement of foreign judgments for multiple (treble) damages. PTIA § 5, *id.* at 837. Another section takes the United Kingdom's resistance to treble damages one step further, creating a cause of action for persons doing business in the United Kingdom to sue for two-

[4] The Antitrust Division specifically has rejected this view. "[Courts'] antitrust jurisdiction and processes should continue to focus, as they traditionally and successfully have * * *, on protecting U.S. commerce, U.S. consumers, and competition in U.S. markets." *Delrahim Remarks* 17.

thirds of a foreign treble-damages antitrust judgment. SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 4:17, at 4-34 & -35 (3d ed. 1997); PTIA § 6, 21 I.L.M. at 837-838.

These provisions arise from a significant policy difference with the United States. See A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257, 277 (1981) ("the unenforceability of competition judgments 'reflects the principle whereby sovereign states do not accept an obligation to enforce the public economic policies of other sovereign states'") (quoting 973 Parl. Deb., H.C. (5th ser.) (1979) 1546). Unlike the United States, the British Government considers multiple damage awards penal, and will not enforce them. See, *e.g.*, United Kingdom Response to U.S. Diplomatic Note Concerning the U.K. Protection of Trading Interests Bill (Nov. 27, 1979), 21 I.L.M. 847, 849 (1982). The British Government, in addition, does not agree with encouraging private citizens to act as private attorneys general. As that government has explained, the U.S. policy replaces "the usual discretion of public authority to enforce laws in a way which has regard to the interests of society" with "a motive on the part of the plaintiff to pursue defendants for private gain thus excluding international considerations of a public nature." *Ibid.* In addition, "where criminal and civil penalties co-exist, those engaged in international trade are exposed to double jeopardy." *Ibid.*

But the tensions between the United States and the United Kingdom in this arena are not unique. Other countries also have adopted statutes with provisions similar to those contained in the PTIA. Canada, the Netherlands, Australia, Germany, France, and New Zealand have statutes that block foreign discovery. WALLER, *supra*, § 4:16; 1 FUGATE, *supra*, § 3.11. These blocking statutes "were directed principally at American antitrust enforcement." WALLER, *supra*, § 4:16. Australia and Canada have statutes that allow blocking of the enforcement of foreign antitrust judgments. *Id.* § 4:17. Australia's and

Canada's statutes also contain "clawback" provisions that create the right to sue to recover money paid under a foreign antitrust judgment that is deemed unenforceable. *Ibid.* "When a country's allies begin competing with each other in enacting legislation directed at frustrating, and indeed retaliating against, actions of the first country, conflict and resentment is clear." *Id.* § 4:19.

Australia is particularly pertinent to the FTAIA issue raised by the petition, because it is the situs of some of the alleged injury in this case. Furthermore, as any weekly reader of BNA's Antitrust and Trade Regulation Report can attest, Australia has one of the world's most active antitrust enforcement authorities. Australia and the United States have entered into an agreement (see *Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance* (April 27, 1999), available at http://www.usdoj.gov/atr/public/international/docs/usaus7.wpd) to facilitate the exchange of confidential information during the course of civil or criminal antitrust investigations pursuant to the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6200-6212. As long ago as 1982 – the year the FTAIA was passed – Australia had an agreement relating to cooperation on antitrust matters with the United States. See *Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters* (Jun. 29, 1982), available at http://www.usdoj.gov/atr/public/international/docs/austral.us.txt. Given this history of cooperation, one can safely infer that Australia's hostility is not to the *substance* of U.S. antitrust laws, but to the efforts of the United States to dictate to other countries how their citizens will be compensated (as plaintiffs) or regulated and punished (as defendants). This case, in which foreign plaintiffs seek to recover from foreign defendants for foreign injuries – just because *someone else* felt an injury in the United States from the same conduct – arises at the apex of concern by friendly U.S. trading partners about U.S. unilateralism in antitrust matters. "As part of our efforts to

enhance our international efforts towards cooperation on cartel enforcement, many countries pointed to the impact of *Empagran* for their reluctance to enter into information sharing pacts with the United States." *Delrahim Remarks* 10.

This country should not unthinkingly impose its antitrust laws and policy choices on the rest of the world. That is particularly true when the decisions are not the considered policy judgment of Congress or the Executive Branch, but actually fly in the face of the views of those charged with enforcing the antitrust laws. Pet. 7-8; *Delrahim Remarks* 7-10. The United States has encouraged other nations to adopt and enforce antitrust laws. See Kovacic, *Lessons*, *supra,* at 362. "We now live in a world where there are nearly 100 jurisdictions with antitrust laws of one sort or another, from Albania to Zambia, where both foreign governments and foreign firms take antitrust seriously." *Delrahim Remarks* 2. Three of the four sovereign nations where the effects alleged in this case occurred – the Ukraine, Australia, and Panama – have their own antitrust authorities. See http://www.globalcompetitionreview.com/home/links.cfm (visited Nov. 23, 2003). The United States "should be hesitant to skew the development of other countries' antitrust regimes, private and public, by encouraging a dependence on U.S. treble damage actions for the redress of antitrust injuries." *Delrahim Remarks* 8.

B. The result below is not in any way limited to major international cartels like those alleged in *Kruman* and this case. Challenges to run-of-the-mill business transactions, between foreign companies that also transact business in the United States, threaten to become a staple of U.S. District Court dockets. In 2000, Canada's two major air carriers – Air Canada and Canadian Airlines – merged into one company. As a result, routes throughout Canada, and routes between Canadian and U.S. origins and destinations, were faced with a diminution in the number of competitors, and thus perhaps a diminution in competition, under traditional understandings of U.S. antitrust doctrine. See U.S. Department of Justice, Horizontal Merger

Guidelines ¶ 2.0 ("Other things being equal, market concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power."). Concerns for competitive effects in Canadian air markets have appropriately been the subject of inquiry by Canada's Competition Tribunal. See, *e.g.*, *Commissioner of Competition* v. *Air Canada*, 2003 Comp. Trib. 13 (Jul. 22, 2003). And Canadian plaintiffs have availed themselves of Canada's antitrust regime to protect their interests in markets where the dominant Air Canada firm competes. See *ibid.* (intervention by WestJet Airlines, Ltd.).

Likewise, where Air Canada competes in U.S. markets, it has been subjected to suits by plaintiffs claiming injury from activities in those markets. See, *e.g.*, *Air Freight Haulage Co.* v. *Ryd-Air, Inc.*, 1978-2 Trade Cas. ¶ 62, 321 (S.D.N.Y. 1978) (dismissing antitrust suit against defendants including Air Canada). Under any reading of the FTAIA, plaintiffs claiming injury in the United States flowing from the Air Canada-Canadian Airlines merger would have a basis to sue in U.S. courts. For example, a U.S. plaintiff reliant on air service in a route – such as Toronto to Washington, D.C. – where Air Canada and Canadian Airlines previously competed clearly had a cause of action under U.S. antitrust law to contest the merger. See 15 U.S.C. § 15 (permitting private damages actions for violations of the antitrust laws); *Midwest Machinery, Inc.* v. *Northwest Airlines, Inc.*, 167 F.3d 439 (8th Cir. 1999) (allowing private damages action to challenge consummated airline merger).

But the rule adopted below substantially broadens the range of possible antitrust lawsuits. Under that interpretation of the FTAIA, Canadian consumers or competitors could sue in the United States for harm they claim to have suffered on intra-Canadian routes – so long as "*some* private person or entity has suffered actual or threatened injury" in the United States as a result of the merger. Pet. App. 23a (emphasis added). In the Chamber's view, such a *reductio ad absurdum* – and the obvious affront to Canada that it entails – is practically enough by itself to show the D.C. Circuit's error *on the merits*. In any event,

such an untoward result should not be allowed to result from a 2-1 D.C. Circuit decision, denied rehearing en banc by a 4-3 vote, contrary to the views of the Executive Branch. Even if such a result is somehow correct, this Court has a responsibility to announce the governing rule itself, not allow tremendous international friction to result from the votes of a small number of D.C. Circuit judges.

III. The Worldwide Standing Rule that the D.C. Circuit Propounded Has No Basis in This Court's Law and Undermines Congress's Intent in Enacting the FTAIA

On the merits, the Chamber agrees with the arguments in the petition and in the *amicus* brief filed by the Solicitor General in support of rehearing below. The Chamber can therefore state its own views in abbreviated form.

A bedrock principle of U.S. antitrust law is that "a plaintiff must prove the existence of 'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Brunswick*, 429 U.S. at 489). Plaintiffs injured in foreign countries by the foreign effects of defendants' alleged price-fixing activities neither suffer injury of the type the American antitrust laws were intended to prevent nor suffer injury that flows from that which makes defendants' acts unlawful. That which makes defendants' acts unlawful is the domestic effects, not the foreign effects, of defendants' activities. Under black-letter "antitrust injury" doctrine, respondents are not proper plaintiffs under the U.S. antitrust laws.

The legislative history of the FTAIA has been the subject of some debate among the various courts considering this issue, and among the briefs before this Court. Compare Pet. 14-15; *HeereMac*, 241 F.3d at 428-429 & n.25; *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 716 (D. Md. 2001); *In re Copper Antitrust Litig.*, 117 F. Supp. 2d 875, 887 (W.D. Wis.

2000), with Br. in Opp. 23 & n.13; Pet. App. 24a. But there is no debate about Congress's intent in the arena of antitrust standing: "[T]he Committee does not intend to alter existing concepts of antitrust injury or antitrust standing." H.R. REP. NO. 97-686, at 11 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2496.

Remarkably, *respondents* read the FTAIA as importing the *Brunswick* rule. Br. in Opp. 22 ("Clause 2 imports the requirements of 'antitrust standing' that a plaintiff may recover only for 'injur[ies] of the type the antitrust laws were intended to prevent.'") (quoting *Brunswick*, 429 U.S. at 489). Respondents thus correctly understand that the FTAIA left unchanged the antitrust injury doctrine this Court clearly stated in *Brunswick* (Br. in Opp. 22), but incorrectly interpret the decision below to accord with the *Brunswick* rule. Indeed, the Court need look no further than *Brunswick* to resolve the legal issue that has split the circuits. *Brunswick* makes clear that any one antitrust violation gives rise to claims by some plaintiffs, while it does not give rise to claims by others. Antitrust standing turns on the nature of the injury incurred by *the party seeking access to the courts* – not the fact of antitrust injury in a vacuum. For this reason, along with those petitioners and the Solicitor General have stated, the judgment below should be reviewed and reversed.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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